In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1735

SIMON GORDEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The sole question raised by the petition is whether, under the facts and circumstances of this case, the district court's refusal to make available a presentence report to petitioner constituted an abuse of discretion.

1. Petitioner was convicted in the United States District Court for the Southern District of Illinois after pleading guilty to failing, after notice, to deposit withholding taxes in a special bank account in trust for the government employee, in violation of 26 U.S.C. 7215 (Pet. App. 1). On May 18, 1973, the district court denied petitioner's motion for disclosure of the presentence report and, after hearing testimony, denied petitioner's motion for probation. On that same date, the court sentenced petitioner to imprisonment for one year (Pet. 4; May 18 Tr. 45).[1]

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[1] "Tr." references are to portions of the transcript of proceedings in the district court held on May 18 and June 22, 1973.

After the hearing on the motions for disclosure and for probation, the court stated: "I've refused since I've been a judge to make these reports available" (Pet. 7; May 18 Tr. 45). However, the district court orally disclosed at the hearing the general nature of the matters in the presentence report that it believed justified the sentence (Pet. App. 3). It specifically referred to the aggravated nature of petitioner's long history of delinquencies in paying trust fund taxes and the fact that the report showed that he was not a good family man (Pet. 6; Pet. App. 3; May 18 Tr. 42-43). After allowing petitioner an opportunity to give any reason for a "lesser penalty" and offering to "listen to anything you say" (May 18 Tr. 43, 44), the court imposed a sentence of one year.

Prior to the execution of the sentence, petitioner filed a motion to reconsider the sentence and grant probation (Pet. 7). The district court thereupon held a full hearing in which it was revealed that petitioner (1) had given bad checks to his employees (June 22 Tr. 16-20), (2) was currently delinquent in payment to a union of fringe benefits to which the union members were entitled (June 22 Tr. 16-20), (3) owed the government about $18,000 in employment taxes (June 22 Tr. 68, 139), (4) admitted being chronically delinquent in paying trust fund taxes (June 22 Tr. 33-34), (5) averaged three delinquent employment tax accounts per year of the four that were due (June 22 Tr. 102-103), (6) had had tax liens filed against him on 22 occasions since 1961 (June 22 Tr. 103-105). The evidence further showed that notice of levy to collect taxes had to be served on third parties about twice a year (June 22 Tr. 106-107), and even after petitioner's arrest and release on bond for failure to deposit employment taxes in October 1972, he failed to deposit such taxes again only two weeks later (June 22 Tr. 53-59).

After hearing all the evidence concerning petitioner's long history of delinquencies in handling trust fund taxes, the district court concluded that the sentence should stand (Pet. App. 3; June 22 Tr. 137-139, 142-145, 149, 151-154, 166). The court of appeals affirmed (Pet. App. 1-4).

2. Petitioner contends (Pet. 8, 10-11) that the district court's refusal to allow him to see the presentence report, upon which it relied in imposing sentence, was an abuse of discretion. Rule 32(c) of the Federal Rules of Criminal Procedure (Pet. 2-3) provides that a court may disclose all or part of the material contained within the report of the presentence investigation. This rule does not make the report available to a defendant as a matter of right. To the contrary, the rule is permissive and allows the court to use its discretion in determining whether to reveal any part of the report. *Baker* v. *United States*, 388 F. 2d 931 (C.A. 4); *United States* v. *Humphreys*, 457 F. 2d 242 (C.A. 7).[2]

In this case, the record demonstrates beyond question that the district court essentially revealed the elements in the presentence report that were influential in the imposition of sentence. As the court of appeals noted, while the district court refused to make the complete report available, it did orally disclose "the general nature of the matters in the presentence report on which he relied in fixing the sentence." Moreover, the record reveals that before sentencing petitioner, the district court afforded him an opportunity to rebut the factors it relied upon in fixing the sentence (Pet. App. 3-4). Moreover, prior to the execution of sentence, the district court permitted petitioner, in a subsequent hearing on his motion to reduce sentence, the opportunity to answer, explain or show the court that it was misinformed concerning the factor it mainly relied upon

in originally sentencing him, *viz.*, his "chronic abuse of trust fund tax obligations" (Pet. App. 4). The hearing simply confirmed the aggravated nature of petitioner's disregard for the handling of trust fund taxes (June 22 Tr. 33-34, 53-59, 68, 102-107, 139). Since petitioner was fully informed of the reasons for the sentence and was afforded a fair and full opportunity to answer, explain, or rebut the factors relied upon by the court in fixing his sentence, the district court did not abuse its discretion under Rule 32(c) in refusing to disclose the entire presentence report. *United States* v. *Carden*, 428 F. 2d 1116 (C.A. 8); *United States* v. *Humphreys, supra.*[2]

3. Contrary to petitioner's contention (Pet. 11-14), the decision below does not conflict with either *United States* v. *Bryant*, 442 F. 2d 775 (C.A. D.C.); or *United States* v. *Brown*, 470 F. 2d 285 (C.A. 2). Both of those cases held that the question of disclosure of the presentence report is within the discretion of the trial court. In holding that the district court abused its discretion, the District of Columbia Circuit in *Bryant* emphasized the length of the defendant's sentence (18 to 54 years) coupled with his lack of a prior criminal record. Under these circumstances, the court concluded that the district court was obligated to make known what, if anything, in the report formed the basis of the sentence. Similarly, the Second Circuit held in *Brown* that there was an abuse of discretion in the sentencing of the defendant where

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[2] Disclosure of the presentence report is not constitutionally required. In *United States* v. *Picard*, 464 F. 2d 215, 220 (C.A. 1), the court held only that the substance of a presentence report, to the extent relied upon by the trial judge, must be made known to the defendant. In *United States* v. *Janiec*, 464 F. 2d 126 (C.A. 3), the court held that where the defendant or his counsel requests disclosure of the list of prior convictions, the trial judge is required to do so or disclaim any reliance on it.

the court imposed a three-year sentence on a defendant who had no prior criminal record, without any comment or explanation for the sentence other than that it was "appropriate." Like *Bryant*, nondisclosure of the presentence report was held to be an abuse of discretion because it did not afford the defendant an adequate opportunity to comment, answer or explain any facts relied upon by the court in imposing sentence. Here, on the other hand, the district court orally disclosed the general nature of the matters in the presentence report upon which it relied in imposing sentence and afforded petitioner an adequate opportunity to rebut the matters relied upon by the district court in determining the sentence (Pet. App. 3-4).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1974.

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